IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1098 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE Z.K.SAIYED

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
SITARAM ZIPRU PATIL & 3 - Opponent(s)

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Appearance :
MS FALGUNI PATEL, APP for Appellant(s) : 1,
MR KIRTIDEV R DAVE for Opponent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 23/11/2007

ORAL JUDGMENT

1. The present acquittal Appeal has been filed by the State, under Section 378 Cr. P.C., against the Judgment and order dated 9.8.1995, rendered in Criminal case No.1975 of 1991 by learned

Judicial Magistrate, First Class, Jambusar. The said criminal case was registered against the present respondent for the offence punishable under Sections 451, 427 504 and 114 of Indian Penal Code. The said Judgment of the trial Court has been challenged by the State on the ground that the Judgment and order passed by the learned Magistrate is against the law and evidence. It is also contended by the State that the duty of the Police personnel is to protect the life and properties of the citizen and they have no right to damage the property or household articles like T.V., watch, etc., that the learned Magistrate has erred in giving undue importance to the minor omission and contradiction appearing in the evidence of the prosecution witnesses and also erred in holding that identification parade was not conducted according to the procedure.

2. According to the prosecution case the original complainant has filed complaint on 1.11.1990. It is contended by the complainant that on 1.11.1990 – Thursday at around 6.00 o'clock in the early morning four police personnel came to her residence and asked to open the door. She has not opened the door because she was alone in the house as her husband, along with children, were sleeping in their another house. Therefore, the police has opened the door, situated at the back side of her house, and entered the house of

the complainant and ransacked the T.V., cup-board, radio, clock, glasses, etc. by giving blows with the buts of the Rifles and caused damaged. She was also abused by all the four police personnel. Thereafter, they ran away.

3. On completion of investigation, the police filed charge-sheet. During trial, the statements of witnesses were recorded. Plea were record at Ex.2 to Ex.5. In support of the case, the prosecution has produced documentary as well as oral evidence of the prosecution witnesses. The prosecution has examined the complainant at Ex.20. The complaint was exhibited at Ex.21. The prosecution has also examined witness Usmanbhai Haji Mirsab at Exh.25, Bharatbhai Jagmohandas Akruwala, Mamlatdar & Executive Magistrate at Exh.26, before whom the identification parade of the accused was held, the panchnama of identification was produced at Exh.27. The prosecution has also examined Vasantbhai Gordhanbhai at Exh.28, as panch witness and the panchnama of scene of offence is produced at Ex.29. The prosecution has also examined Dawoodbha Noorbha, Ex.30, Balubhai Mithabhai Ex.31, as panch witnesses. The prosecution has thereafter examined P.S.I. Khemabhai Arjunbhai Patel, at Exh.32, who has taken the complaint of the complainant and registered the offence against the accused. Thereafter, the trial Court has recorded the statement of the accused u/s.

313 Cr. P.C. At the conclusion of the trial, after considering the oral as well as documentary evidence led by the parties and arguments advanced, the learned trial Judge, vide impugned Judgment and order acquitted the accused persons. The said Judgment and order has been challenged by the State by way of present Appeal u/s.378 of Cr.P.C.

4. I have heard learned A.P.P. Ms. Falguni Patel, on behalf of the appellant – State and Mr. Kirtidev Dave for the respondents.

5. Just to convince the Court the learned APP Ms. Patel has argued that the order of the trial Court is against the provision of law; that the trial Court has not properly appreciated the ingredients of Sections 451, 427, 504, 114 I.P. Code. She has further submitted that from the oral evidence of the complainant, it is established that all the respondents – accused entered the house from the rear door of the house and committed criminal trespass. She has also submitted that looking to the ingredient of Section 504 I.P. Code it is established that the complainant was insulted by the present accused. She has thereafter submitted that the trial Court has also committed mistake in not believing the identification parade. It is, therefore, submitted that the order of the trial court is not legal and proper and requires to be

quashed and set aside.

7. Mr. Dave, learned Advocate, On behalf of the respondents, has contended that from the oral evidence of the prosecution case it is not established that the respondents have committed any offence of trespass. Even at the time of identification parade which was held by the Mamlatdar & Executive Magistrate, a Public servant, the complainant was not able to identify as to who had entered the house from rear door of her house. He has also argued that the Hon'ble Supreme Court has held in number of cases regarding identification parade that the same can be relied if proved satisfactorily. However, in the instant case, identification parade is doubtful. He has contended that the prosecution has not produced any single iota of evidence qua the dummy persons called by the Mamlatdar for identification parade as to their age, height and appearance, etc. It was not produced before the trial court through the oral evidence of maker of the panchnama, viz. Panch witness. So the oral evidence of the panch witness is totally doubtful and the Mamlatdar has displayed gross negligence during the identification parade held by him. Mr. Dave has also argued that from the evidence of witnesses the prosecution has failed to establish the case against the accused. He has also contended that looking to the evidence of the prosecution

witnesses and looking to the identification parade, the trial Court has rightly acquitted the accused and the order of the trial Court is just, proper and in accordance with law and prayed to dismiss the Appeal.

8. Section 451 I.P. Code provides that “whoever commits house-trespass in order to committing of any offence punishable, shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.....” So far as Section 441 of the I. P. Code is concerned, it provides that whoever enters into or upon property in the possession of another with intent to commit an offence and if involvement of any person is required to be proved as trespasser then the identity of that person is required to be established and when the alleged act of the respondents is concerned which is against them, charge and defence of mischief is prescribed under section 425 I.P. Code.

9. I have gone through the whole evidence produced before me. It is true that the present criminal case rests upon the identification parade and on the oral evidence of Bharat Jagmohandas (Exh.26), Mamlatdar & Executive Magistrate, who has conducted the Identification parade. From his oral evidence, it appears that he has not explained that on which date and at what time he

has carried out identification parade. It is true that being a public servant he has deposed before the trial Court, but from his oral evidence he is unable to say before the trial Court that how he has prepared the panchnama of identification parade. Even from the oral evidence of the said witness it appears that he was unable to say that for which purpose he has arranged the said identification parade. From his oral evidence it also appears that no doubt 9 persons as dummies were there, but he is unable to say anything as to from which place they were produced before him. When a person who is serving as Mamlatdar & Executive Magistrate, who is empowered to conduct identification parade it is required for him to obtain some yadi from Police, but in the present case said Executive Magistrate also could not say anything before the trial Court regarding the police yadi.

9. It is an established law that when any identification parade is to be carried out by any Executive Magistrate, it is his duty to compare the out-look, physical appearance of the accused, colour of heirs, skin, etc. and then he can arrange to produce dummies having nearly similar look and appearance and figure. But, so far as the oral evidence of the Executive Magistrate is concerned, the trial Court has rightly observed that he has not followed any

principles of law which is laid down by Hon'ble Apex Court, while conducting identification parade.

10. I have also gone through the oral evidence of the complainant as well as other witnesses. It is true that the trial Court has observed that material contradictions have been brought on record before him in the oral evidence of the witnesses. From the oral evidence of the prosecution witnesses no overt act of the accused – present respondents is established before the trial Court during the trial.

11. Even the panchnama of the scene of offence is also does not disclose whether present respondents have committed which type of criminal act. Thus, in my view, the identification parade is doubtful. There are also material contradiction in the evidence of complainant – wife and her husband. Some of the prosecution witnesses have turned hostile. The prosecution has, therefore, failed to prove its case beyond reasonable doubt and hence the same cannot be relied upon.

11. It is settled legal position that in acquittal appeal, the Appellate Court is not required to re-write the judgment or to give fresh reasonings when the Appellate Court is in agreement with the reasons assigned by the trial

Court acquitting the accused. In the instant case, this Court is in full agreement with the reasons given and findings recorded by the trial Court while acquitting the respondents – accused and adopting the said reasons and for the reasons aforesaid, in my view the impugned Judgment is just, legal and proper and requires no interference at this appellate stage. Hence, this Appeal requires to be dismissed.

12. In the result, the Appeal is hereby dismissed. The impugned Judgment and order dated 9.8.1995 passed by the learned J.M.F.C., Jambusar in criminal Case No.1975 of 1991, acquitting the respondents – accused, is hereby confirmed. Respondents – accused are on Bail, their bail bonds stand discharged.

(Z.K.SAIYED, J.)

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